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No. 82-1960  
IN THE  
**Supreme Court of the United States**

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October Term, 1982

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EARL BRENNAN, *et al.*,

*Petitioners,*

vs.

CITY OF LOS ANGELES,

*Respondent.*

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**Brief in Opposition to Petition  
for Writ of Certiorari.**

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**Questions Presented.**

1. Whether this Court should grant a Petition for Writ of Certiorari when the Petitioners have failed to properly raise any federal question at any prior stage of these proceedings.
2. Whether this Court should grant a Petition for Writ of Certiorari when the decision below was properly placed upon a nonfederal ground.

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**Jurisdiction.**

The Petition for Writ of Certiorari (hereinafter "Petition") does not present an important question of federal law. Accordingly, there is a lack of any special and important reasons for reviewing the instant case on writ of certiorari. Further, as Respondent City of Los Angeles (hereinafter "City") will discuss *infra*, this Court should not exercise its jurisdiction because the Petitioners failed to raise properly any federal issue, in violation of Supreme Court Rule 21, and the California Court of Appeal properly rested its judgment on a nonfederal ground.

**Statement of the Case.**

The Respondent offers the following Statement of the Case as supplemental to that presented in the Petition:

1. August 21, 1968 — Board of Airport Commissioners passed a Resolution of Condemnation, including all but

- three of the Petitioners' properties. [CT #1 61 and 164]<sup>1</sup>
2. February 4, 1969 — Los Angeles City Council adopted an Ordinance of Condemnation, including all but three of the Petitioners' properties. [CT #1 24, 109 and 165]
  3. November 18, 1970 — Board of Airport Commissioners passed a Resolution of Condemnation, including the three Petitioners' properties not included in the Resolution of August 21, 1968. [CT #1 167]
  4. September 1, 1972 — By this date, Respondent had filed eminent domain (direct condemnation) proceedings against all of the Petitioners' properties, except the three covered by the Resolution of November 18, 1970. [CT #1 168]
  5. September 1, 1974 — By this date, Respondent had served the Summons and Complaints in Eminent Domain on the Petitioners, except the owners of the three properties covered by the Resolution of November 18, 1970. [CT #1 169]
  6. February 2 — February 10, 1977 — A Trial of Legal Issues with respect to the Petitioners' properties is held in Department 15 of the Los Angeles Superior Court, the Honorable Alexander R. Early, III, Judge Presiding [CT #1 125-133; RT 21-436]
  7. May 17, 1977 — Judge Early made the following rulings:
    - A. There was no "De Facto" taking by Respondent of any of Petitioners' parcels. [CT #1 172 and 181]

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<sup>1</sup>The Clerk's Transcript in 2nd Civil No. 59058, containing 361 pages, will be referred to herein as CT #1; the Clerk's Transcript in 2nd Civil No. 60702, containing 502 pages will be referred to herein as CT #2. The Reporter's Transcript, containing 1077 pages, will be referred to herein as RT; the Augmented Reporter's Transcript, containing 60 pages, will be referred to herein as ART.

- B. The dates of unreasonable delay by Respondent in its acquisition of all but three of Petitioners' properties were February 21, 1970 to August 29, 1972 and September 1, 1973 to September 1, 1974. [CT #1 172-173 and 182]
  - C. The dates of unreasonable delay by Respondent in its acquisition of the remaining three of Petitioners' properties were May 18, 1972 to the dates of filing of the respective inverse condemnation actions with respect thereto. [CT #1 173 and 182]
  - D. Respondent did not engage in any oppressive conduct toward the Petitioners other than the unreasonable delay described above. [CT #1 173 and 182]
  - E. With respect to the *Klopping* damages, if any, arising from the unreasonable delay described above, evidence of actual unreasonable delay damage to Petitioners may be received, arising from any of Petitioners' attempt(s), and subsequent inability, to sell their respective properties after the date of probable inclusion within the Respondents' Airport acquisition project, and of their attempt(s), and subsequent inability, to rent or to use or develop their properties during the above-described periods of unreasonable delay. Regarding the admissibility of such evidence, the Court will be bound by, and will follow, the California Court of Appeal opinion in *City of Los Angeles v. Lowensohn* (1976) 54 Cal.App.3d 625 (hearing denied). [CT #1 173-174 and 183]
- 8. June 6, 1977 — Petitioners' attorneys filed their Objections to Judge Early on the grounds stated in Code of Civil Procedure Section 170(5). [CT #1 185]
  - 9. June 14, 1977 — Judge Early filed his Consent to Transfer Trial. [CT #1 202]



10. July 20, 1977 — The instant case was assigned for all purposes to Judge William A. Caldecott. [CT #1 210]
11. August 11, 1977 — Judge Caldecott accepted the instant case for all purposes. [CT #1 216]
12. November 18, 1977 — Judge Caldecott ruled that he would reopen the legal issue previously decided by Judge Early as to whether there was a "De Facto" taking by Respondent of the Petitioners' parcels. [CT #1 225]
13. April 26 — May 9, 1978 — A jury trial to determine the fair market value as of September 1, 1972, of 32 of Petitioners' properties is held in Department 40 of the Los Angeles Superior Court, the Honorable William A. Caldecott, Judge Presiding. [CT #1 246-256; RT 520-1028]
14. May 9, 1978 — The jury rendered verdicts setting the total fair market value for the 32 parcels, as of September 1, 1972, at \$671,250. [CT #1 255-256 and CT #2 122-124]
15. July 28, 1978 — Following a Hearing on July 7, 1978, Judge Caldecott issued his Judgment awarding the Petitioners interest at the legal rate on the amount of their fair market value awards from August 28, 1972, to the date of payment into Court of those awards, based upon a "De Facto" taking of Petitioners' properties by Respondent on August 28, 1972, and *Klopping* "unreasonable delay" damages. [CT #1 282-284 and 323-324; CT #2 135-146; ART 1-11]
  - A. The interest award, from August 28, 1972 through June 20, 1978, with respect to the 32 of Petitioners' parcels for which the fair market value was determined by a jury verdict on May 9, 1978,

totalled \$268,500. [CT #1 284 and 324-325]

- B. The interest award was also applicable to the additional unsettled parcels in Respondent's Airport land acquisition project. Once the fair market value award is determined, by trial or settlement, interest was to be paid by Respondent on each of said awards from August 28, 1972, until the respective awards are paid into Court for Petitioners' benefit. [CT #1 284, 324 and 326-329A]
  - C. Judge Caldecott reserved for future order by the Court any issue(s) with respect to Attorneys' and Appraiser's fees and other costs of trial with respect to the 32 trial parcels. [CT #1 284 and 324]
- 16. August 1, 1978 — Judge Caldecott's Judgment of July 28, 1978, was entered.
  - 17. September 11, 1978 — Following Judge Caldecott's death, the Hearing on Respondent's Motion to Tax Costs and Petitioners' Motion for Award of Litigation Costs Pursuant to C.C.P. §1249.3 was assigned to Judge Harry L. Hupp. [CT #2 457] Judge Hupp ruled that, with respect to the 32 trial parcels, Petitioners were entitled to receive attorneys' and appraiser's fees and miscellaneous litigation costs, in amounts to be determined later, pursuant to C.C.P. §§1249.3 and 1246.3 (now C.C.P. §§1250.410 and 1036, respectively) for the following reasons:
    - A. In making the comparison required by C.C.P. §1249.3, the \$268,500 interest awarded by Judge Caldecott, due to a "De Facto" taking and *Klopping* damages, must be added to the jury's fair market value awards, and that total compared with the Respondent's Final Offers and Petitioners' Final Demands. In so doing, the Respondent's Final Offers were unreasonable and the Petitioners' Final Demands were reasonable, for purposes of C.C.P. §1249.3.

- B. The “De Facto” taking found by Judge Caldecott amounted to a taking of an interest in Petitioners’ properties by Respondent, for purposes of C.C.P. §1246.3. [CT #1 354; CT #2 458-459; ART 55 and 58]
- C. However, Judge Hupp also ruled that, if Judge Caldecott had *not* awarded the Petitioners the \$268,500 in interest, based upon a “De Facto” taking and *Klopping* damages, then, in making the required comparison, pursuant to C.C.P. §1249.3, to determine the reasonableness of Respondent’s Final Offers and Petitioners’ Final Demands, said Final Offers and Final Demands would be compared *only* with the jury’s awards for fair market value. In addition thereto, Petitioners would *not* be considered successful litigants in an inverse condemnation proceeding for the taking of an interest in their respective properties, pursuant to C.C.P. §1246.3.

Under the above circumstances, Judge Hupp found, as compared with the jury’s fair market value awards, the Respondent’s Final Offers were reasonable and the Petitioners’ Final Demands were also reasonable, and, therefore, Petitioners would not be entitled to receive any attorneys’ fees, appraiser’s fees or miscellaneous costs, pursuant to either C.C.P. §1249.3 or C.C.P. §1246.3. [CT #2 459-460; ART 40; RT 1056]

- 18. January 29, 1979 — For the reasons stated above, Judge Hupp, in an Order After Judgment, awarded Petitioners attorneys’ fees in the sum of \$100,000, appraiser’s fees in the sum of \$20,000 and miscellaneous costs of \$9,805.04, a total of \$129,805.04. (CT #2 461-462, 464, 467 and 470; RT 1067)

19. March 29, 1979 — Judge Hupp, in a Second Order After Judgment, dated April 9, 1979, awarded Petitioners an additional \$4,000 in attorneys' fees. [CT #2 493; RT 1077]
20. December 14, 1982 — The California Court of Appeal, in *City of Los Angeles v. Property Owners* (1982) 138 Cal.App.3d 114, reversed the award to Petitioners of interest, fees and costs, based upon both a "de facto" taking and an award of "unreasonable delay" damages pursuant to *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 (Petition, Appendix A)
21. January 11, 1983 — The Petitioners' Petition for Rehearing was denied by the California Court of Appeal. (Petition, Exhibit B)
22. March 2, 1983 — The Petitioners' Petition for Hearing was denied by the California Supreme Court. (Petition, Exhibit C)

## REASONS FOR DENYING WRIT.

### I.

#### **The Petitioners Did Not Comply With Supreme Court Rule 21, by Failing to Raise Properly Any Federal Issue.**

The Petitioners did not, at any prior stage of these proceedings, properly raise any issue of federal law. As a result, their Petition does not comply with Rule 21 of the Supreme Court Rules, and is grounds for the denial of their Petition.

Rule 21.1(h) of the Supreme Court Rules, requires the following:

“If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised as to give this Court jurisdiction to review the judgment on writ of certiorari.”

Petitioners contend that they raised the federal question with respect to the Fifth and Fourteenth amendments to the United States Constitution in the Answers to the City's condemnation Complaints, Cross-Complaints filed against the City in the condemnation cases, and Complaints in separate inverse condemnation cases brought against the City, which was reiterated in every brief filed in the trial court and on appeal. (Petition, pp. 3-4)

In fact, there is no citation to the United States Constitution in any of said documents. The only citation to any

constitutional provisions found in any document filed by Petitioners prior to the instant Petition is a citation to Article I, Sections 1 and 19 of the California Constitution, found in Petitioners' (Respondents') Brief filed in the California Court of Appeal. Needless to say, the Petition is devoid of any mention of "the way in which [the federal questions] were ruled upon by the Court," and there are no references to places in the record where these matters appear.

The United States Supreme Court "is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised. . . ." (*Edelman v. California* (1953) 344 U.S. 357, 358)

The Petitioners did not comply with the preceding requirements of Supreme Court Rule 21; they did not timely and properly raise any federal issue and, as a result, this Court does not have jurisdiction to review the judgment of the California Court of Appeal on writ of certiorari.

## II.

### **The California Court of Appeal Properly Rested Its Judgment on Nonfederal Grounds.**

This Court should not issue the requested Writ of Certiorari because, contrary to the Petitioners' contentions, the California Court of Appeal rested its judgment on adequate state, not federal, grounds.

A writ of certiorari will not issue to review a state court decision if the judgment rests on an adequate state ground. (*Wilson v. Loew's Incorporated* [1958] 355 U.S. 597, 598; *Edelman v. California*, *supra*, at pp. 363-364; *Johnson v. Thornburgh* [1928] 276 U.S. 601)

Even if the judgment of a state court rests on two grounds, one of which is federal and the other non-federal in character, jurisdiction of the United States Supreme Court fails if the non-federal ground is independent of the federal ground

and adequate to support the judgment. (*Jankovich v. Indiana Toll Road Comm.* [1965] 379 U.S. 487, 489; *Fox Film Corp. v. Muller* [1935] 296 U.S. 207, 210)

In *Jankovich*, it was found to be significant that the state court's opinion did *not* suggest that its conclusion flowed from a federal, rather than a state, source, or that it was based less forcefully on the state constitution rather than the federal constitution. The lower court opinion had relied on both state and federal constitutions. It was held that the state provisions were an independent and adequate state ground of decision which deprived the United States Supreme Court of jurisdiction to review the state court judgment. (379 U.S. at pp. 489-492)

Interestingly enough, even if "the highest court of a state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, [the United States Supreme Court] will not take jurisdiction to review the judgment." (*Stembridge v. Georgia* [1952] 343 U.S. 541, 547)

The California Court of Appeal decision was clearly based upon Article I, §19, of the California Constitution and the California Supreme Court decision in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39.

It should be noted that the provisions of Article I, §19, of the California Constitution go beyond those of the Fifth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution provides that "private property [shall not] be *taken* for public use, without just compensation." (Emphasis added) On the other hand, Article I, §19, of the California Constitution provides that "[p]rivate property may be *taken or damaged* for public use only when just compensation . . . has first been paid to, or into court for, the owner." (Emphasis added) The "or damaged" provision is unique to the California Constitution;



only the "taking" provision is contained in both the state and federal constitutions.

In their separate inverse condemnation Complaints and in their responsive pleadings to the City's eminent domain Complaints, Petitioners frequently allege that their properties were "taken and damaged" by the City and pray for just compensation for "the taking, damaging and loss of use" of their properties.

As mentioned earlier in this Brief, the *only* citation to any constitutional provisions found in any document filed by Petitioners prior to the instant Petition is a citation to Article I, Sections 1 and 19 of the California Constitution, found in Petitioners' (Respondents') Brief filed in the California Court of Appeal.

In their separate Complaints and responses to City's eminent domain Complaints, Petitioners sought *damages* from alleged unreasonable delays by the City in its eminent domain actions, pursuant to the California Supreme Court's decision in *Klopping v. City of Whittier, supra*. Any payment by the City to Petitioners based on an award pursuant to the *Klopping* decision would be a payment of *damages* to Petitioners, not a payment of compensation for a *taking*. (*Stone v. City of Los Angeles* [1975] 51 Cal.App.3d 987, 997-998)

It is clear from the foregoing, that the Petitioners were seeking compensation for an alleged *taking and damaging* pursuant to Article I, §19, of the California Constitution and the *Klopping* decision by the California Supreme Court, that the California Court of Appeal, in addressing these allegations, rested its judgment on adequate state, not federal, grounds, and, therefore, that this Court should not review the judgment of the California Court of Appeal on writ of certiorari.



**Conclusion.**

The Petitioners failed to raise properly any federal issue, the California Court of Appeal properly rested its judgment on a nonfederal ground, and, consequently, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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